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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. GILBERT JIMENEZ, Defendant and Appellant.	F060984 (Fresno Sup. Ct. No. F08900775) **OPINION**

APPEAL from a judgment of the Superior Court of Fresno County. Hilary A. Chittick and Don Penner, Judges.

Sylvia Whatley Beckham, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Julie A. Hokans and Jeffrey A. White, Deputy Attorneys General, for Plaintiff and Respondent.

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INTRODUCTION

Appellant Gilbert Jimenez appeals from a judgment of conviction of multiple counts of resisting an executive officer and assault arising from a police pursuit of his vehicle through metropolitan Fresno. He challenges the sufficiency of the evidence underlying certain charged counts, alleges sentencing error, and requests this court to independently examine the record of in camera hearings relating to his motions for discovery under *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*).

STATEMENT OF THE CASE

On July 14, 2009, a jury returned verdicts finding appellant Gilbert Jimenez guilty in counts 1 and 2 of resisting an executive officer (Pen. Code,[1] § 69), in count 3 of assault on a peace officer (§245, subd. (c)), and in count 4 of misdemeanor assault (§ 241, subd. (c)), a lesser included offense of that charged in the information, with three prior prison terms (§ 667.5, subd. (b)).

On August 25, 2010, the superior court denied appellant probation and sentenced him to state prison for a total term of seven years eight months. The court imposed the upper term of five years on count three, a term of eight months (one-third of the middle term) on count 2, and consecutive one-year terms on two of the three prison priors. The court sentenced appellant to a concurrent upper term of three years on count 1 and ordered him to serve 187 days in county jail on count 4. The court imposed a $1,600 restitution fine (§ 1202.4, subd. (b)), imposed and suspended a second such fine pending successful completion of parole (§ 1202.45), and awarded 735 days of custody credits.

On September 16, 2010, appellant filed a timely notice of appeal.

STATEMENT OF FACTS

In 2008, California Highway Patrol Officer Corben Whitney and Department of Motor Vehicles Investigator Chris Wagner, a sworn peace officer, were members of the

[1] All further statutory references are to the Penal Code unless otherwise stated.

Fresno HEAT team, a law enforcement unit that investigated auto thefts. On the afternoon of January 29, 2008, Officer Whitney and Investigator Wagner were on duty and traveling eastbound on McKinley Avenue in an unmarked black Dodge Dakota pickup truck.

Whitney was dressed in tennis shoes and jeans and wore a bullet-proof vest under a gray pullover sweatshirt. Whitney had his gun and his badge on his right hip and testified that when he worked in plain clothes, he would generally identify himself as an officer by having his badge and sidearm exposed. According to Whitney, Investigator Wagner was dressed in jeans and an open button-down shirt over a tactical vest. Whitney said Wagner's vest had the word "Police" in four or five-inch letters across the chest area and included a large gold-colored badge insignia.

As Whitney and Wagner conducted their patrol, Whitney saw appellant driving a silver Nissan Quest van westbound on McKinley Avenue near West Avenue. Whitney said he recognized appellant from the Fresno Police Department Daily Crime Bulletin. Whitney made a U-turn, positioned his vehicle behind the van, and started to conduct a rolling surveillance. Whitney and Wagner ran the license plate number from the van and determined the vehicle had not been reported as stolen. The address of the registered owner was on the 4000 block of North Fruit Avenue.

At one point in the surveillance, appellant turned right onto West Avenue and drove northbound. A bus pulled out from the curb and got behind the van. Whitney pulled the pickup truck alongside the van to confirm appellant's identity. Whitney said there were four occupants of the van. Appellant was in the driver's seat, a female was in the front passenger seat, and a male and female were located in the back seat. The passengers continuously looked over their shoulders at the Dakota pickup, and appellant looked at Officer Whitney through the side mirror of the van. Appellant drove on northbound West Avenue, turned right onto Shaw Avenue, and proceeded eastbound on

Shaw. As appellant crossed Fruit Avenue he accelerated to approximately 60 miles per hour in a posted 40 miles per hour zone.

After appellant drove on Shaw Avenue for a few miles, someone threw a small object from the passenger side window of the van. This occurred before the van reached the intersection of Shaw and Blackstone Avenues. Investigator Wagner described it as "small bindle of something." Officer Whitney continued to follow the van and did not stop so that he and Wagner could collect the item. At 2:25 p.m., Whitney advised the dispatcher that he was at the intersection of First Street and Shaw Avenue. Whitney requested a marked unit to make a traffic detention.

Appellant turned into the exit driveway of a shopping center on Shaw Avenue just east of First Street. Whitney drove to the main entrance of the center and turned into the parking lot. Appellant parked in a stall between a SUV on the driver's side and a white Suburban on the passengers' side. Whitney parked the pickup truck so that its front bumper was located next to the rear bumper of the Suburban. The female passengers exited from the van and walked to a store. Investigator Wagner said the male passenger exited from the rear passenger door of the van and threw a bindle onto the running board of a vehicle parked next to the van. At trial, the parties stipulated the substance in the bindle was methamphetamine. Appellant got out of the driver's seat and he and Whitney approached one another.

Officer Whitney was holding a police radio in his hand when he encountered appellant. Appellant cursed several times, saying, "What the f**k." Appellant kept one of his hands in his pants pocket, even though Officer Whitney ordered him to remove his hand from the pocket. When appellant was about three feet from Whitney, appellant turned so that the hand in the pocket was not visible to the officer. Whitney placed appellant against the side of the van to immobilize him.

Appellant struggled with Whitney at the side of the van and managed to get back to the open driver's door, recline on the driver's seat, and start the engine. Officer

Wagner went around the van to the driver's side and assisted Whitney. Whitney said appellant tried to punch him and "came out with knife" and tried to stab Whitney in the face. According to Whitney, appellant swung the knife in a stabbing motion approximately five times. Whitney struck back with his handheld police radio.

When Wagner reached the driver's side of the van, he saw appellant seated at an angle by the steering wheel. Wagner saw Whitney reach halfway into the vehicle and saw appellant kick and punch at Whitney. According to Wagner, Whitney tried to subdue appellant by striking his head multiple times with the police radio. The blows with the radio drew blood but appellant continued to resist Whitney. Whitney yelled to Wagner something to the effect of, "[H]e's got a knife. He's trying to stab me." Wagner reached into the van with his left hand and grabbed appellant by the neck. Appellant placed the van into drive and the van went forward over a curb-like concrete planter and hit a small tree. Wagner said the van could not proceed any further and then went into reverse. Wagner said he and Whitney were "still within the door frame area of the van … while the defendant was seated in the driver's seat." Wagner said appellant was still actively resisting the officers.

As the van went in reverse, Wagner backed up, drew his duty weapon, and fired three rounds. Whitney had fallen down on his knees at the time Wagner fired the third shot. Whitney said he dropped to his knees and ducked so that the open door of the van would not strike the back of his head. Appellant's van continued in reverse motion with the tires screeching and hit the front end of the Dakota pickup and another nearby vehicle. Appellant left the parking lot and turned eastbound on Shaw Avenue. Whitney and Wagner called in the incident and then pursued the van in the damaged Dakota pickup truck. They eventually lost sight of the van and returned to the shopping center to secure the crime scene.

A short time later, Fresno Police Officer Art Rodriguez, a member of the Street Violence Bureau, responded to a dispatch about a single vehicle collision near the area of

Shields and Cedar Avenues. When Rodriguez arrived, he found the van in the number two lane of Cedar Avenue, south of Shields Avenue. The front passenger side of the van, including the front passenger tire, was crushed inward. Appellant, the sole occupant of the van, had sustained injuries to the upper torso area and was taken to a hospital. Officers found a large quantity of blood on the front driver's seat and floorboard. They also found a two-inch hole on the front driver's seat, from which a spent copper bullet was retrieved. Officers found a clear handled, serrated knife resting on the rear center floorboard of the van. However, this knife did not match the description of the knife appellant used to attempt to stab Officer Whitney. One of the responding officers, Fresno Police Officer Art Rodriguez, said a baggie found at the scene of the accident contained white residue that he believed to be methamphetamine. Officers found a glass smoking pipe in the van and a second such pipe among appellant's personal belongings at the hospital.

Defense Evidence

Joy Johnson testified that she was an employee at the Starbucks in the First Street and Shaw Avenue shopping center where the incident occurred. Johnson said she noticed some activity that did not appear "normal" when she arrived for work at about 1:30 p.m. Johnson said she saw one man who "looked very hard, he was bald, he was wearing a white shirt and pants, and at one point he lifted his shirt and I saw a black belt, but he wasn't wearing any police gear." Johnson said she did not hear any gunshots.

Elmer Lehman, a locksmith whose shop was near the parking lot, testified he heard gunshots and saw a van drive out of the parking lot. Lehman said he went to the area where the shots were fired and did not see any uniformed officers. He saw people in plain clothes but did not see anyone wearing a police badge.

Fresno Police Detective Rafael Villalvazo testified he conducted a tape-recorded interview with Officer Whitney on January 29, 2008. Whitney testified he stopped appellant in the parking lot near a store at the First Street and Shaw Avenue shopping

center. However, Whitney never told Villalvazo that he advised appellant he was being arrested.

DISCUSSION

I. THERE WAS SUFFICIENT EVIDENCE TO SHOW THAT APPELLANT KNEW OR SHOULD HAVE KNOWN THAT WHITNEY AND WAGNER WERE UNDERCOVER OFFICERS PERFORMING THEIR DUTIES.

Appellant contends there was insufficient evidence to show that he knew or reasonably should have known that the undercover officers were police officers acting in the performance of their duties.

A. Specific Contention

In his opening brief, appellant asserts that counts 1 and 2 were not supported by substantial evidence because there was insufficient proof that he knew or reasonably should have known that Officer Whitney and Investigator Wagner were police officers. !(AOB 9)! He submits: "For a very brief moment, just before appellant began to resist and assault, one of the undercover officers lifted his shirt to reveal a firearm and badge. Appellant contends that this was not sufficient substantial proof that appellant actually knew the men were police officers to sustain the resisting convictions, and not sufficient substantial proof that appellant reasonably should have known the assaulted person was a police officer to sustain the assault convictions. Accordingly, each conviction violates appellant's right to due process of law as guaranteed by the Fourteenth Amendment and, therefore, must be reversed."

B. Applicable Law

1. Resisting an Executive Officer

Penal Code section 69, as charged in counts 1 and 2, states:

> "Every person who attempts, by means of any threat or violence, to deter or prevent an executive officer from performing any duty imposed upon such officer by law, or who knowingly resists, by the use of force or violence, such officer, in the performance of his duty, is punishable by a fine not exceeding ten thousand dollars ($10,000), or by imprisonment

pursuant to subdivision (h) of Section 1170, or in a county jail not exceeding one year, or by both such fine and imprisonment."

Section 69 is designed to protect police officers against violent interference with performance of their duties. (*People v. Martin* (2005) 133 Cal.App.4th 776, 782.) The statute prohibits two distinct types of activity – threats and violent conduct – when either activity constitutes an attempt to deter or prevent an executive officer from performing any duty imposed upon such officer by law. The statute does not require that a defendant engage in both threats and violent conduct. (*People v. Hines* (1997) 15 Cal.4th 997, 1062.) Section 69 criminalizes both physical resistance to an officer and attempts, by threats or violence, to deter or prevent an officer from performing his or her duties. That is, a threat made to an officer with the requisite intent may violate the statute even if it does not have the desired effect. (*People v. Hines, supra*, 15 Cal.4th at pp. 1060-1061 [maker of threat need not have the present ability to act on it]; *In re M. L. B.* (1980) 110 Cal.App.3d 501, 503-504 [statute violated by making of threat alone]; *People v. Superior Court (Anderson)* (1984) 151 Cal.App.3d 893, 897 [target of threat need not fear it will be carried out].)

The two methods of violating section 69 have been called "attempting to deter" and "actually resisting an officer." The first type of offense can be established by a threat unaccompanied by any physical force and may involve attempts to deter either an officer's immediate performance of a duty imposed by law or the officer's performance of such a duty at some time in the future. For the second type of offense, the resistance must include force or violence and the officer had to be lawfully engaged in the performance of duty at the time of the defendant's resistance. (*People v. Rasmussen* (2010) 189 Cal.App.4th 1411, 1418-1419; *People v. Carrasco* (2008) 163 Cal.App.4th 978, 984-985.) When a defendant is charged with the second method of violating section 69, the People must prove that the defendant "knew" the officer was performing his duty at the time the defendant used force or violence to resist the officer. (*People v. Lacefield* (2007) 157 Cal.App.4th 249, 256-257.)

2. Assault on a Peace Officer

Section 245, subdivision (c), as charged in counts 3 and 4, states:

> "Any person who commits an assault with a deadly weapon or instrument, other than a firearm, or by any means likely to produce great bodily injury upon the person of a peace office or firefighter, and who knows or reasonably should know that the victim is a peace officer or firefighter engaged in the performance of his or her duties, when the peace officer or firefighter is engaged in the performance of his or her duties, shall be punished by imprisonment in the state prison for three, four, or five years."

As a general rule, the crime of assault does not depend upon proof of specific intent. However, the aggravated kind of assault described in section 245, subdivision (c) requires the defendant's reasonable awareness of his or her victim's identity as a peace officer engaged in the performance of his or her duties. (*In re Cline* (1967) 255 Cal.App.2d 115, 123 [construing predecessor statute to § 245, subd. (c)].)

In determining the sufficiency of evidence, we must review the whole record in the light most favorable to the judgment to see whether it contains substantial evidence. Substantial evidence is that which is credible and of solid value, from which a rational trier of fact could have found the defendant guilty beyond a reasonable doubt. We presume in support of the judgment the existence of every fact the jury could reasonably have deduced from the evidence. Whether the evidence presented at trial is direct or circumstantial, the relevant inquiry on appeal is whether any reasonable trier of fact could have found the defendant guilty beyond a reasonable doubt. (*People v. Lara* (1994) 30 Cal.App.4th 658, 665.)

C. Analysis

Appellant contends his convictions for resisting officers and assault on a police officer must be reversed because there was insufficient evidence to show "he knew or reasonably should have known that the undercover agents he resisted and assaulted were police officers. This is because the undercover officers who followed appellant, Whitney and Wagner, concealed their identity by wearing plainclothes and driving an unmarked vehicle. Moreover, neither Whitney nor Wagner ever, at any time before or during the

resistive and assaultive conduct verbally identified themselves as police officers." Appellant acknowledges on appeal that "Whitney briefly lifted his shirt to reveal a firearm and a badge he wore on his hip just before he approached appellant to arrest him. However, there was no evidence presented that appellant actually looked at the badge on Whitney's hip while it was briefly displayed."

As noted in the statement of facts above, Officer Chris Wagner testified about their arrival at the shopping center following the pursuit of the van. Wagner said Officer Whitney got out of the unmarked pickup truck first and then Wagner followed. Wagner testified, "I saw Officer Whitney's badge and gun as it appears on his right hip with a badge in front of his gun …." Wagner said he did not identify himself as a police officer to the male passenger in the van "[b]ecause I felt at the time that he knew who I was, that he turned around and placed his hands behind his back because he knew who I was." Officer Whitney testified, "As I was getting out [of the pickup truck at the shopping center], I pulled my sweatshirt tight between the snap of my holster and my side to expose my badge and my gun." Whitney he did this "[s]o that the people I was contacting would know I was a policeman." Whitney said he had used this type of technique in the past. After Whitney exposed his badge, he went toward appellant, who had just stepped from his vehicle.

The testimony of a single witness is sufficient to sustain a conviction, unless the testimony is physically impossible or inherently improbable. (Evid. Code, § 411; *People v. Young* (2005) 34 Cal.4th 1149, 1181.) An appellant's citation of conflicting evidence, as here, is of no avail on appeal. On review of a claim of insufficiency of the evidence, the appellate court resolves neither credibility issues nor evidentiary conflicts. Rather, the reviewing court looks for substantial evidence. (*People v. Maury* (2003) 30 Cal.4th 342, 403. An appellate court will not substitute its evaluation of a witness's credibility for that of the fact finder. (*People v. Vazquez* (2009) 178 Cal.App.4th 347, 352.)

Sufficient evidence supported the finding that appellant knew of the peace officer status of Officers Whitney and Wagner.

II. THERE WAS SUFFICIENT EVIDENCE TO SHOW THAT APPELLANT FORCIBLY RESISTED INVESTIGATOR WAGNER IN THE PERFORMANCE OF HIS DUTIES.

Appellant also contends that there was insufficient evidence to support the verdict on count 2, the conviction for forcibly resisting Investigator Wagner in the performance of his duties.

A. The Charge

In count 2 it was alleged:

> "On or about January 29, 2008, in the above named judicial district, the crime of RESISTING EXECUTIVE OFFICER, in violation of PENAL CODE SECTION 69, a felony, was committed by Gilbert Jimenez, who did unlawfully attempt by means of threats or violence to deter or prevent Chris Wagner, who was then and there an executive officer, from performing a duty imposed upon such officer by law, and did knowingly resist by the use of force or violence said executive officer in the performance of his/her duty."

B. Analysis

The applicable law has been set forth in the discussion of issue I, *ante*. At trial, Officer Whitney described his confrontation with appellant. Whitney said appellant refused to take his hand out of his pocket, and Whitney was concerned because of the possibility that appellant had a weapon secreted there. Whitney tried to hold appellant against the van to prevent him from using the hand in his pocket. As Whitney did so, appellant tried to move into the open door of the vehicle. Whitney said he maintained pressure on appellant, and "we both kind of went into the vehicle …." Appellant struggled to get into the van and punched at Whitney with his hands at least two times. At some point appellant exhibited a knife and tried to stab Whitney in the face. Appellant got the keys in the ignition, started the van, and put it in forward gear, hitting a curbed planter box and a tree.

When appellant put the van in reverse, Whitney was standing in the "crook of the door" and was pulled by the reverse motion of the vehicle. As the left front tire went over Whitney's foot, appellant tried to stab the officer. At that time, Whitney saw Wagner out of the corner of his eye. Whitney hollered out to Wagner that appellant was trying to stab him. Wagner testified that Whitney hit appellant in the head with a police radio but the blows had no effect on appellant. Wagner said appellant tried to hit and kick Whitney. Wagner went to Whitney's side of the van and attempted to subdue appellant by grabbing him with his left hand around the neck. Wagner said he and appellant were within two feet of each other. Wagner said he and Whitney were within the door frame area of the van while appellant was seated in the driver's seat and "was still actively resisting" at that time. Wagner also said he was having difficulty staying on his feet because he was trying to control the suspect while the vehicle was moving forward. When appellant put the van in reverse, Whitney told Wagner that appellant had a knife. Wagner said he "made the split-second decision to back up and draw my duty weapon and fire two rounds at the suspect." Wagner explained that if he had not done so, the suspect might have been able to stab Whitney. Wagner fired a third shot "in an attempt to stop the threat of the vehicle."

As noted in issue I, *ante*, the second type of offense defined by section 69 "makes it a crime to 'knowingly resist[], by the use of force or violence, [an] officer in the performance of his duty ….' " (*People v. Hines*, *supra,* 15 Cal.4th at p.1062, fn. 15; *People v. Lacefield*, *supra*, 157 Cal.App.4th at p. 255 (*Lacefield*).) For the second type of offense under section 69, the resistance must include force or violence, and the officer must be lawfully engaged in the performance of duty at the time of the defendant's resistance. (*In re Manuel G.* (1997) 16 Cal.4th 805, 816; *Lacefield*, *supra*, at p. 255.) "The word 'knowingly' imports only a knowledge that the facts exist which bring the act or omission within the provisions of [the Penal] Code. It does not require any knowledge of the unlawfulness of such act or omission." (§ 7, subd. 5, cited with approval in *People*

v. Rasmussen, supra, 189 Cal.App.4th at p. 1419.) Use of the words "knowingly" and "willfully" in a penal statute usually define a general criminal intent. (*People v. Rasmussen, supra,* 189 Cal.App.4th at p. 1419.)

From the combined testimony of Officer Whitney and Investigator Wagner, the jury could reasonably infer that appellant used force to knowingly resist Wagner's attempt to restrain and apprehend appellant as the latter attempted to punch and stab Whitney. Substantial evidence supported the jury's finding that appellant forcibly resisted Officer Wagner.

III. THE MISDEMEANOR ASSAULT CONVICTION DOES NOT REQUIRE REVERSAL.

Appellant contends the misdemeanor assault conviction on count 4 must be reversed because it is necessarily included in the count 3 conviction for felony assault on Officer Whitney.

A. Specific Contention

Appellant notes that the jury found him guilty on count 3 by finding he committed an assault with a deadly weapon, a vehicle, upon Officer Whitney. He further notes the jury found appellant guilty on count 4 by finding he committed misdemeanor assault with a knife upon Officer Whitney. He maintains "multiple convictions for assault with a deadly weapon and misdemeanor assault on the same officer during an uninterrupted course of assaultive conduct are barred." He submits the convictions were based upon assaultive conduct against the same victim, were committed at the same time and place, and, therefore, the lesser misdemeanor offense must be reversed.

B. The Charges

Count 3 of the information alleged that appellant violated section 245, subdivision (c) by committing "an assault with a deadly weapon, to wit, a Vehicle, upon the person of Corben Whitney …." Count 4 of the information alleged that appellant violated section 245, subdivision (c) by committing "an assault with a deadly weapon, to wit, a Knife

upon the person of Corben Whitney …." The jury found appellant guilty as charged in count 3 and guilty of misdemeanor assault on a peace officer (§ 241, subd. (c)), a lesser included offense of assault with a deadly weapon, on count 4.

C. Discussion

Appellant contends the conviction for simple assault on a police officer as found for count 4 is a lesser and necessarily included offense of assault with a deadly weapon on a police officer as found on count 3. He points out the assaults were committed in an uninterrupted episode while Officer Whitney was trying to arrest him. He cites to *People v. Jefferson* (1954) 123 Cal.App.2d 219 (*Jefferson*), for the proposition that "assaultive conduct cannot be parsed into multiple convictions."

In *Jefferson, supra*, 123 Cal.App.2d 219, the defendant quarreled with her husband and police responded to the scene. The defendant threatened officers with a butcher knife outside her home. She even slashed the uniform of one of the officers. The defendant eventually reentered the home and placed the butcher knife on a dresser. Officers followed her into the home and grabbed the knife. At that point, the defendant said she had another knife, removed a pocket knife from her purse and began slashing at officers. Officers finally detained her and she was convicted of assault with a deadly weapon. She appealed, contending the trial court denied her request for the prosecution to elect between the assaults as the basis for the charged offense. The Fourth Appellate District held the rule of election had no application where a series of facts form part of one and the same transaction and as a whole constitute the same offense. Both of the matters relied upon occurred in the course of a continuous effort on the part of the officers to disarm the defendant. The trial court did not err in declining to compel the prosecution to elect as to which part of the attack it relied upon. (*Id.* at pp. 220-221.)

In the more recent case of *People v. Johnson* (2007) 150 Cal.App.4th 1467 (*Johnson*), the defendant was convicted of three counts of corporal injury upon a cohabitant (§ 273.5) arising from a single incident in 2004. The trial court imposed

sentence on all three counts but stayed the terms for two of them pursuant to section 654. Although the defendant received punishment for only one of the three counts, he argued the multiple convictions were improper because the incident was a single continuous assault, albeit involving multiple blows. He appealed, contending he could not receive multiple convictions for violating section 273.5 where the convictions were based on multiple injuries inflicted during a single course of conduct. The Sixth Appellate District concluded that the crime described by section 273.5 is complete upon the willful and direct application of physical force upon the victim, resulting in a wound or injury. Therefore, it followed that where multiple applications of physical force resulted in separate injuries, the perpetrator completed multiple violations of section 273.5. (*Johnson, supra,* 150 Cal.App.4th at pp. 1474-1477.)

The proper analysis involves a determination of when the charged crime is completed. An appellate court reviews the record in the light most favorable to the judgment to determine whether it discloses substantial evidence – that is, evidence which is reasonable, credible, and of solid value – such that a reasonable trier of fact could find appellant guilty beyond a reasonable doubt of the multiple crimes charged against him or her. (*Johnson, supra,* 150 Cal.App.4th at pp. 1476-1477; *People v. Harrison* (1989) 48 Cal.3d 321, 329.)

Under section 241, subdivision (c), "[w]hen an assault is committed against the person of a peace officer … engaged in the performance of his or her duties … and the person committing the offense knows or reasonably should know that the victim is a peace officer … engaged in the performance of his or her duties … the assault is punishable by a fine not exceeding two thousand dollars ($2,000), or by imprisonment in the county jail not exceeding one year, or by both the fine and imprisonment."

Under section 245, subdivision (c), "[a]ny person who commits an assault with a deadly weapon or instrument, other than a firearm, or by any means likely to produce great bodily injury upon the person of a peace officer … and who knows or reasonably

should know that the victim is a peace officer … engaged in the performance of his or her duties, when the peace officer … is engaged in the performance of his or her duties, shall be punished by imprisonment in the state prison for three, four, or five years."

A simple assault is "nothing more than an attempted battery." (*People v. Fuller* (1975) 53 Cal.App.3d 417, 421.) Battery requires an actual touching, whereas assault is complete upon the attempted use of force or violence on the person even without an actual touching. (*People v. Marshall* (1997) 15 Cal.4th 1, 38-39; *People v. Page* (2004) 123 Cal.App.4th 1466, 1473.) Here, as respondent points out, appellant's initial assault consisted of punching, kicking, and seeking to stab Officer Whitney with a knife. At the conclusion of that assault, appellant started his vehicle and drove it forward and backward while Officer Whitney was standing in the crook of the door. The latter conduct constituted an assault with a deadly weapon, i.e., a vehicle. Appellant effected one of the assaults with his hands and feet and the other assault with his vehicle. Under the principles of *Johnson, supra*, 150 Cal.App.4th 1467, he was properly convicted of multiple assaults, even though the acts occurred within a short period of time.

Nevertheless, appellant "invokes the judicial rule barring conviction of a greater and lesser included offense based upon the same set of facts. (*People v. Sanchez* (2001) 24 Cal.4th 983, 987.)" In *Sanchez,* the Supreme Court observed: " '[T]his court has … affirmed multiple convictions for a single act or indivisible course of conduct,' leaving it to the sentencing court to determine whether to stay execution of sentence on one or more convictions pursuant to section 654 in order to avoid multiple punishment for the same act. [Citation.] A defendant, however, cannot be convicted of both an offense and a lesser offence necessarily included within that offense, based upon his or her commission of the identical act. [Citation.]" (*People v. Sanchez, supra,* 24 Cal.4th at p. 987.)

As respondent points out, the rule of *Sanchez* is inapplicable here because appellant's two convictions were not based upon an identical act. Rather, he was convicted of one count from his actions that occurred prior to starting the vehicle and

another count from actions that occurred after he started and drove the vehicle. Appellant was properly convicted of two counts of assault on Officer Whitney.

IV. THE CONCURRENT TERM IMPOSED FOR RESISTING OFFICER WHITNEY SHOULD BE STAYED UNDER SECTION 654.

Appellant contends, and respondent concedes, the concurrent term imposed on count 1 for resisting Officer Whitney must be stayed pursuant to section 654.

Respondent explains: "Because the facts supporting the conviction for violation of section 69 (count 1) are the same facts that support the violations for sections 241, subdivision (c), and 245, subdivision (c) (counts 3 and 4), the sentence on count 1 should have been stayed pursuant to section 654."

The superior court is directed to stay the concurrent term imposed on count 1, prepare an amended abstract of judgment to reflect the stay, and transmit certified copies of the amended abstract to all appropriate parties and entities.

V. APPELLANT REQUESTS THAT THIS COURT INDEPENDENTLY EXAMINE THE RECORD OF THE IN CAMERA HEARINGS RELATING TO APPELLANT'S MOTIONS FOR DISCOVERY.

Appellant requests that this court review the sealed transcripts of several in camera hearings in the superior court to ascertain whether (1) the trial court administered the oath to the custodians of records and (2) whether the trial court abused its discretion in ruling that there was no discoverable information in the confidential personnel files reviewed during the in camera hearings. Respondent does not interpose an objection to this request.

A. Brief Procedural History of the *Pitchess* Motion

Appellant twice moved to compel disclosure of information in the confidential records relating to Officer Whitney and Investigator Wagner. On May 7, 2009, prior to trial, Fresno Superior Court Judge Don Penner conducted several in camera hearings – one relating to Officer Whitney's personnel records and one relating to Investigator Wagner's personnel records – and determined that their respective files contained no

discoverable information. On July 12, 2010, during trial, Fresno Superior Court Judge Hillary Chittick conducted an in camera hearing to determine whether Officer Whitney's trial testimony about a foot injury was materially inconsistent with his earlier statements in confidential law enforcement reports and memoranda relating to the incident. Judge Chittick concluded there was nothing discoverable in the documents and declined to order disclosure. Invoking the Supreme Court's ruling in *Pitchess v. Superior Court*, *supra*, 11 Cal.3d 531, appellant asks this court to independently examine the record of the in camera hearings in the superior court.

B. *Pitchess* Motion Before Judge Penner

On April 3, 2009, prior to trial, appellant's trial counsel filed a *Pitchess* motion to compel disclosure of information from the confidential personnel files of Officer Corben Whitney and Investigator Chris Wagner. Appellant specifically asked about instances of possible fabrication, dishonesty, and excessive force. On May 7, 2009, the court granted appellant's request for discovery from the personnel files of the officers. On the same date, Superior Court Judge Don Penner conducted two in camera hearings on the motion, one with respect to the records of Investigator Wagner and one with respect to the records of Officer Whitney. The court administered the oath to both Lieutenant Bruce Williams, custodian of records for the CHP, and to Supervising Investigator Tom Wilson, custodian of records of the DMV. The court found no complaints regarding excessive force or dishonesty on the part of Officer Whitney and Investigator Wilson.

C. *Pitchess* Motion During Trial Before Judge Chittick

During trial on July 12, 2010, Officer Whitney testified that appellant had run over his foot and that he, Whitney, had reported the matter to his sergeant. CHP Lieutenant Bruce Williams brought a redacted report of the incident and some pictures of the incident to the court. Lieutenant Williams was placed under oath and questioned about a portion of the report entitled, "Injury Descriptions." The defense requested the entire report and Deputy Attorney General Michelle K. Littlewood, representing the CHP,

suggested that she might assert a privilege with respect to the full report. Although the Judge Chittick was under the impression the report was a worker's compensation packet, the court instructed the trial prosecutor to "find out exactly what there is and advise the Court."

After a number of exchanges with counsel, Judge Chittick conducted an in camera review of the incident report pursuant to *Pitchess*, went back on the record, and stated:

> "There is a very small amount of information that…contains statements by Officer Whitney. The Court has reviewed those. There is nothing discoverable in that information and, therefore, the Court will not order any disclosure with respect to that.
>
> "With respect to the foot, the Court has reviewed the unredacted copy of the report, there is no relevant information on the unredacted portion of the report. And since the redacted portion of the report and the photographs have already been disclosed, the Court will not order further disclosure with respect to that.
>
> "The Court is maintaining a complete copy of the information that the Court reviewed, and it would be placed under seal in the court file. And the Court's transcript of the in camera proceedings shall be sealed as well."

D. Conclusion

The Supreme Court has outlined the proper procedure and conclusion in this appeal:

> "A trial court's ruling on a motion for access to law enforcement personnel records is subject to review for abuse of discretion. (*Pitchess v. Superior Court*, [*supra*,] 11 Cal.3d [at p.] 535.) Consistent with customary procedure, the records have been made part of the record on appeal but have been sealed, and appellate counsel for defendant ha[s] not been permitted to view them. (See Cal. Rules of Court, rule 33.5(b)(2).) As we have done in similar situations…we independently have examined the materials in camera, and conclude that the trial court did not abuse its discretion in refusing to disclose the contents of either officer's personnel files." (*People v. Hughes* (2002) 27 Cal.4th 287, 330 (*Hughes*).)

The record in the present case is adequate to permit meaningful appellate review. We have independently reviewed the transcripts, records, and settled statement provided

under seal and conclude that Judge Penner, the pretrial judge, and Judge Chittick, the trial judge, did not abuse their discretion in ruling on appellant's respective *Pitchess* motions. (*People v. Prince* (2007) 40 Cal. 4th 1179, 1285; *Hughes, supra,* 27 Cal.4th at p. 330.) We also confirm that the custodians of records who appeared at the various *Pitchess* hearings were placed under oath before offering testimony.

DISPOSITION

The superior court is directed to stay the concurrent term imposed on count 1, prepare an amended abstract of judgment to reflect the stay, and transmit certified copies of the amended abstract to all appropriate parties and entities. In all other respects, the judgment is affirmed.

_____
Poochigian, J.

WE CONCUR:

_____
Gomes, Acting P.J.

_____
Detjen, J.